Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Docket No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AUGUST 1999

EMANUEL HAZANI,

Petitioner,

v.

OKI ELECTRIC INDUSTRY CO. LTD., OKI AMERICA, INC., SAMSUNG GROUP, SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG SEMICONDUCTOR, INC., MITSUBISHI ELECTRIC CORPORATION, MITSUBISHI ELECTRONICS AMERICA, INC., NEC CORPORATION, and NEC ELECTRONICS, INC.,

Respondents

On Petition For Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

PETITION FOR WRIT OF CERTIORARI

Emanuel Hazani
Pro se
1210 Sesame Drive
Sunnyvale, CA 94087
(408) 737-1877

QUESTIONS PRESENTED

(1) Whether the time to appeal an interlocutory district court decisions runs from the time of each interlocutory decision or from the time of the district court's final decision on the merit in a patent infringement case.

(2) Assuming the interpretation of the last Order of a district court as interpreted by Respondents and by the Federal Circuit appeal court is correct, the question is: whether a district court's judge abused his discretion when he declined to review my Fed. R. Civ. P. 60(b) motion ("rule 60(b) motion") which was timely filed and was based *inter alia* on "excusable neglect", but the rule 60(b) motion was not accompanied by a motion for leave to file it, because the Federal Rules of Civil Procedures have no such requirements?

(3) Whether seeking leave of court within a brief of a rule 60(b) motion constitutes a proper form for a *pro se* party, seeking leave of court to file a reply brief to a motion for summary judgement for patent invalidity?

(4)Assuming my interpretation of the last Order of a district court as interpreted by me is correct, and the district court judge did review the Fed. R. Civ. P. 60(b) motion and assuming that he did review my reply brief in opposition to Respondents patent invalidity motion from which he quotes, but not to let me file an opposition to Respondents motion for summary judgement of non-infringement of claim 14 of the patent in suite, did the Federal Circuit abused its discretion by not considering my appeal to review the district court's decisions, and instead treated my request for review as a petition for writ of mandamus which is judged by another standard?

(5) Does a filing of a rule 60(b) motion within sixty days of a district court's order tolls the time for filing an appeal from a district court under Fed. R. Civ. P. 4(a) ("rule 4(a)") as is the case law by at least eight federal circuit courts, and by unpublished opinions of the Federal Circuit, or is the appeal court panel in the case below correct and my filing for an appeal was untimely?

LIST OF PARTIES

All parties appear in the caption of the case on the cover sheet.

TABLE OF CONTENTS

Opinions Below 5
Jurisdiction 5

Constitutional and Statuory Provisions Involved 5

Statement of the Case 5
Interpreting District Court's Order of Dec. 8, 1998. 8
Tolling the Period for Appeal from District Court 11

Reasons For Granting The Writ 12

Conclusion 12

INDEX OF APPENDICES

APPENDIX A: Decision of the U.S. Federal Appeal Court.....13

APPENDIX B: Memorandum And Order of District Court 17
Judge John Lifland. "Entered on the Docket" 12-8 -1998.

APPENDIX C: Selected Portions of District Court's Order 19
of 8-13-98.

APPENDIX D District Court's Order of October 2, 1998. 22

APPENDIX E Letter to Court's Clerk Received DEC 1, 1998. .24

APPENDIX F Two Pages From My Rule 60(b) Motion 25

APPENDIX G District Court's Order of Septmber 11, 1998.....27

TABLE OF AUTHORITIES

CASES

Advanced Estimating Systems Inc. v. Riney. 11
77 F.3d 1322, 38 USPQ2d 1208 (11th Cir. 1996).

Browder v. Director, Department of Correction of Illinois, 7, 11
434 U.S. 257.

Candela Laser Corp. v. Cynosure, Inc., 43 F.3d 1485, 11
1994 WL 702194,*2 (Fed. Cir. 1994)

CTS Corporation v. Pihar International Corporation et al., 8
F 221 USPQ 11 (Fed. Cir. 1984),

Host Mariott Corporation v. Fast food Operation, Inc., 6
891 F. Sup. 1002, 1010 (D.N.J. 1995).

Information Systems and Networks, 994 F.2d 795 8

Pioneer Investment Services v. Brunswick Assoc. Ltd., 7
507 U.S. 380, (1993).

STATUTES

Title 28 U.S.C. § 1254(1). 5
Title 35 U.S.C 4

RULES

Fed. .R. Civ. P. 6(b) and 60(b). ..... here and there
Fed. R. App. P. 4(a). 11

THE ORDER BELOW

The order of the United States court of appeal appear at Appendix A and it is unpublished.

JURISDICTION

The date on which the United State Court of Appeal for the Federal Circuit decided my case was May 14, 1999. This court has jurisdiction to review appeals from the United States Court of Appeals under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUARY PROVISIONS INVOLVED

Federal Rules of Civil Procedure (below referred to as "F.R.C.P") 6(b) and 60(b),

F.R.C.P. 6(b) states in part.:

> "(b) **Enlargement**. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules . . 60(b), . . . except to the extend and under the condition stated in them.".

F.R.C.P. 60(b) States in Part:

> "(b) Mistakes; Inadvertence; Excusable Neglect; . . .On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order, or proceeding for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect;".

STATEMENT OF THE CASE

The underlying case in the district court was a patent infringement litigation under 35 U.S.C., in which the Respondents were accused of infringing my U.S. Patent No. 5,166,904 ("the '904 patent"). An invention that cover a new semiconductor memory cell including a capacitor that has textured surface which reduces the physical space in which to store electronic charge which represent computer data. Because the memory cells' capacitor cover more than 80% of memory chips the invention enabled the reduction of production cost tremendously, so that between 1994 and mid 1996, the prices for Dynamic Random Access Memory ("DRAM") chips dropped by about 30 folds. DRAM is an important commodity in computers and other information processing equipment, which are the engine of today's economy. Alan Greenspan testified before congress in late 1988 that innovations in integrated circuits ("I.C.") are the reason for high productivity of the U.S. economy, which grew in the face of troubled foreign economies. I am aware of no other I.C. invention that had such a big effect on price and productivity.

A chronology of some of the events leading to the district court's ruling of invalidity of the patent is found in Appendix C. In short , the District Court allowed the Respondents to file three motion for summary judgement at the same time, even though I appeared *pro se* and I am not an attorney.

Prior to the filing of Respondents three motion, I filed a motion of change venue from New Jersey to California where I live, before the proceedings in the district court which were put on stay because of an investigation of USITC will begin. During the same time period I discovered that an attorney in the law firm who formerly represented me in the case had a brother attorney employed by NEC's leading law firm in the suite. Under the Third Circuit law, I was compelled to file a motion for disqualification of attorneys "lest the right to move for disqualification may be waved in not timely made". Host Mariott Corporation v. Fast food Operation, Inc., 891 F. Sup. 1002, 1010 (D.N.J. 1995) (citing more).

Despite my attempts to meet the District Court's 14 days reply time to oppose Respondents' motions, I had to ask for extensions of time. I did get three extensions of time which average to be one per each of Respondents motions for summary judgement.

On August 13, 1999, the district court granted Respondents motions before I had a chance to file briefs in opposition. In effect it was a default judgement. After I filed timely motions for extension of time (under F.R.A.P 6(b)), to file a motion for reconsideration, the district court considered them and issued a Memorandum and Order of October 2, 1999 (Appendix D), denying me extension of time and denying as moot a motion on disqualification of attorneys.

The motions for extension of time under F.R.C.P. 6(b), tolled the time for filing the appeal beyond the October 2, 1999, Order. Also "[I]n a civil case.....motion for rehearing or reconsideration is governed by Rule 52(b) or Rule 59, each of which allows only 10 day" (for filing motion to extend time for appeal). Browder , Infra, at ____.

Less than 60 days from October 2, 1999, I filed the motion under F.R.A.P 60(b), invoking "excusable neglect". Because I believe that I met the factors for "excusable neglect" standard, and the Federal Circuit did not challenge my contentions among them a family emergency of a key Expert Witness who I could not consult and get a declaration as to some facts, my falling ill for a short time and a medical emergency involving my father, I will not expand on that standard, but just quote the definition by the Supreme Court.

The Supreme Court's interpretation the phrase "excusable neglect" of Rule 6(b) of Federal Rules of Civil Procedure ("F.R.C.P."), was given in Pioneer Investment Services v. Brunswick Assoc. Ltd., 507 U.S. 380, (1993).

> "Under rule 6(b), where the specified period for the performance of an act has elapsed, a District Court may enlarge the period and permit the tardy act where the omission is the 'result of excusable neglect'. As with Rule . . . . , there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, than, that in applying Rule 6(b), the Courts of Appeals have generally recognized that 'excusable neglect' may extend to inadvertent delays. Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that "excusable neglect" under rule 6(b) is a somewhat 'elastic concept', and is not limited strictly to omissions caused by circumstances beyond the control of the movant."; and

"The same is true of Rule 60(b)(1), which permits courts to reopen judgements for reasons of 'mistake, inadvertence, **surprise**, or excusable neglect,' but only on motion made within one year of the judgement.". Id. at 391-393. (Emphasis added).

Interpreting District Court's Order of December 8, 1998.

The interpretation of the last Order of a district court by the Respondents and by the Federal Circuit appeal court is that the district court did not review my rule 60(b) motion and the associated reply in opposition to Respondents' motion for invalidity of most of the claims of the '904 patent.

Clearly if that is the case, the district court's judge abused his discretion when he declined to review my Fed. R. Civ. P. 60(b) motion ("rule 60(b) motion") which was timely filed and was based *inter alia* on "excusable neglect".

"[T]he standard of review of a district court's denial of a Rule 60(b) motion is abuse of discretion.". CTS Corporation v. Pihar International Corporation et al. F 221 USPQ 11 (Fed. Cir. 1984), (Citing Darlington v. Studebaker-Packard Corp., 261 F.2d 903, 905 (7th Cir.) Cert. Denied, 359 U.S. 992 (1959).

The Federal Circuit decided in Information Systems and Networks, 994 F.2d at 795. (Citing inter alia, Zawadski de Bueno v. Bueno Castro, 822 F.2d 416, 420 (3rd Cir. 1987)): "[O]ur review is guided by the well-established principals that a trial on the merit is favored over default judgement and that close cases should be resolved in favor of the party seeking to set aside default judgement".

Furthermore Federal Circuit's interpretation also calls for finding of abuse of discretion because the Rule 60(b) motion was titled "BRIEF OF MOTION OF PLAINTIFF HAZANI FOR LEAVE TO FILE AND A BRIEF OF MOTION FOR EXTENSION OF TIME AND TO SET ASIDE CERTAIN ORDERS OF THE COURT AND ACTION OF THE CLERK.". (Appendix F). Therefore it was clearly intended to be inter alia seeking the district court a leave to file that motion. Appendix E, shows the cover letter that lists the documents that I submitted for filing, and it is stamped "Received" on Dec 01, 1998. One of those documents was a Notice for the combined motion.

Seeking leave of court within a brief of a rule 60(b) motion constitutes a proper form for a pro se party, who seeks leave of court to file a reply brief to a motion for summary judgement for patent invalidity. An example that prove my point is that my previous motions for extension of time were also combined the way with a motion for leave to file them and those motions were considered by the district court Judge and they appear on the docket sheet as granted.

A second and the correct interpretation of the last Order of a district court as interpreted by me is that the district court judge did review the Fed. R. Civ. P. 60(b) motion and he indeed reviewed my reply brief in opposition to Respondents motion for summary judgement of invalidity of some claims of the '904 patent.

I rely my contention on the fact that the district court Order of Dec. 08, 1998 (Appendix B) was "Entered on the Docket" on "12-8-98", and it was signed as docketed by Mrs. "A. Rossi" the "Deputy Clerk". That is how it was mailed to me. The district court's computer printout of the docket sheet does not show this act of docketing now, but it is well known that computer stored data is susceptible to alteration due to many causes, such as glitches and errors in copying files. The Federal Circuit made an error by considering a computer stored information to be more reliable than a hard copy of paper which was hand signed by Mrs. A. Rossi. This Court should consider the hard copy of Appendix B more reliable than a computer printout.

Specifically, in the Dec. 08, 1998, Order (Appendix B, at __), the district court Judge quotes at least one large paragraph from page 13 of my forty seven pages long reply brief in opposition to Respondents' summary motion for invalidity of the '904 patent. He states that he reviewed again:

> "The Court has again reviewed the decision of the Federal Circuit (which was adverse to plaintiff) and has reviewed Mr. Hazani's brief to determine of Mr. Hazani has any meritorious claim.".

Furthermore the district court Judge gives his reason for granting Respondent's summary judgement motion to be that

"Nothing asserted therein would suggest 'thoroughly justified grounds' for a change in view by the Federal Circuit.". Clearly, the Judge was referring to his August 13 ,1998 decision, in which he cites.

> "'Determinations of the ITC on patent issues and decisions of the Federal Circuit in appeals from ITC determinations are not accorded preclusive or collateral estoppel effect. Texas Instruments, Inc v. Cypress Semiconductor Corp, 90 F.3d 1558, 1568-69 (Fed. Cir. 1996) (citing cases). However, district courts are not free to ignore holdings of the Federal Circuit which bear on cases before them. IL at 1569. District courts may accord whatever persuasive value they consider justified to the prior determinations. Id. On appeal, the Federal Circuit is then free to thoroughly review the district court's decision. Id. The Federal Circuit is bound to follow its own precedents, "and to the extent [it has] previously ruled on a matter, a subsequent panel will have powerful incentives not to deviate from that holding, short of thoroughly justified grounds.'" Id. (emphasis added). (Appendix C).

Therefore it is clear that the district court Judge considered my opposition brief of December 01, 1998, against the Respondent's brief for summary judgement for invalidity of many patent claims and he issued the Order of December 08, 1998, in which he decided wrongly that my opposition brief had not any meritorious claim. That Order was timely appealed to the Federal Circuit , but the particular panel of the Federal Circuit chose to interpret the events and Orders of the district court in a way which I believe to be erroneous and wrong.

After reviewing my brief in opposition to defendants invalidity motion, the district court Judge decided wrongly that "there is no injustice" in not reviewing my yet to be filed other opposition brief on non-infringement of claim 14 of the '904 patent. By deciding so, he abused his discretion.

Given my interpretation of event and Orders of the district court, the Federal Circuit abused its discretion by not considering my appeal to review the district court's decisions, and instead treated my request for review as a petition for writ of mandamus which is judged by another standard.

Tolling the Period for Appeal from District Court.

The Federal Circuit decision is wrong is because the filing of a rule 60(b) motion to extend time due to "excusable neglect" tolls the time to file the Notice of Appeal. This is because the "excusable neglect" provision appears in Federal Rules of Appellate Procedure ("F.R.A.P.") rule 4(a)(5). Because my F.R.C.P. 's rule 60(b) was timely filed in less than 60 days from the last district court Order of October 02, 1998. Advanced Estimating Systems Inc. v. Riney. 77 F.3d 1322, 38 USPQ2d 1208 (11th Cir. 1996). "[Despite the thirty-day time restriction mandated by Rule 4, the running of the appeal period may be tolled by filing one of the motions listed in Rule 4, including a Rule 59 or 60 motion". Id, 38 USPQ2d 1209. The advanced Estimation Systems Inc., Supra at 1210, opinion cites cases from eight federal appeal courts in other federal appeal circuits including Candela Laser Corp. v. Cynosure, Inc., 43 F.3d 1485, 1994 WL 702194,*2 (Fed. Cir. 1994) (unpublished opinion) ("applying Pioneer excusable neglect analysis to Rule 4(a)(5) excusable neglect)". The Federal Circuit appeal court panel is clearly in conflict with eight other federal appeal courts on the issue of tolling time for filing an appeal.

In Browder v. Director, Department of Correction of Illinois, 434 U.S. 257, FootNote 7, the Supreme Court stated clearly that "A timely appeal may be taken under Fed. Rule Appl Proc. 4(a) from a ruling on a Rule 60(b) motion.". (calculating more than ninety days extension of time from October 21 to January 26).

It is interesting to note that while the Respondents argued that the district court case was closed on August 21, 1998, OKI Respondent's local counsel sent a letter to Judge Lifland long after that date demanding the he will issue an Order regarding my still pending appeal of Magistrate Judge's Order on my motion to change of venue. OKI's counsel was appointed by the Court to manage the correspondence between the Court and the parties in February 1998. The Order of Sept. 11, 1998 (Appendix G) resulted therefrom. Since the letter does not appear on the docket sheet, I am asking this Court to permit me to submit a copy of it.

REASONS FOR GRANTING THE WRIT

It is clear than a great injustice occurred by the Order of the Federal Circuit which is on appeal. The Federal Circuit miscalculated the time for filing a Notice of Appeal from from district court's final Order, so its calculations of time are in conflict with the vast majority of the other federal circuit court of the United States. The Federal Circuit should be ordered to apply the correct law as do most of the other circuit in calculating the tolling time introduced be filing motions to extent .me under F.R.C.P. 6(b), motions for reconsideration and motions to extend time under F.R.C.P. 60(b). Thereby, consider my appeal from the district court of New Jersey properly as a request of review and not as a writ of mandamus.

The Federal Circuit misapplied the law and abused its discretion by not reviewing my appeal on the merits of the case with respect to the following district court Orders which should be reviewed by the Federal Circuit: An Order on invalidity of patent claims (Appendix B, which incorporated Appendix C) for which the Federal Circuit should rule if my opposition brief had meritorious claim, an Order dismissing as moot my motion to disqualify Respondent's counsel (Appendix D), and Order dismissing my appeal of Magistrate Judge's Order denying my motion to change venue and transfer (Appendix G). The Federal Circuit should be ordered to consider my appeal of these district court Orders on the merit and on the record from the district court.

CONCLUSION

For the reasons above stated the petition for writ of certiorari should be granted.

Respectfully Submitted.

Emanuel Hazani

Emanuel Hazani Date: August 12, 1999.

APPENDIX A: Decision of the U.S. Federal Appeal Court

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable. It is a public order.

United States Court of Appeals for the Federal Circuit

99-1188

EMANUEL HAZANI,

Plaintiff-Appellant

v.

OKI ELECTRIC INDUSTRY CO. LTD., OKI AMERICA, INC., SAMSUNG GROUP, SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG SEMICONDUCTOR, INC., MITSUBISHI ELECTRIC CORPORATION, MITSUBISHI ELECTRONICS AMERICA, INC., NEC CORPORATION, and NEC ELECTRONICS, INC.,

Defendants-Appellees.

In RE EMANUEL HAZANI
Petitioner

ON MOTION AND ON PETITION FOR WRIT OF MANDAMUS

Before CLEVENGER, RADER, AND BRYSON, Circuit Judges.

RADER, Circuit Judge.

ORDER

Emanuel Hazani moves for leave to file an overlong brief. Oki Electric Industry Co. Ltd. et al. oppose. Hazani moves for leave to

file a reply, with reply attached. Oki moves to dismiss Hazani's appeal as untimely. Hazani opposes. Hazani moves for an extension of time to file his brief, until 14 days after the court decides his motion to file an overlong brief. Hazani requests that that Micron Technology, Inc. and Micron Semiconductor (Micron) be removed from the caption as Micron is not an appellee. The court treats the appeal and the other matters presented as a petition for writ of mandamus.

On May 4, 1998, Oki filed summary judgment motions of noninfringement and invalidity in the United States District Court for the District of New Jersey. Hazani moved multiple times for extensions of time to respond. In the orders granting the second and third motions for extensions, the district court warned Hazani that failure to respond within the time granted would result in the district court treating the motions for summary judgment as unopposed. Hazani's fourth extension motion, filed after the time granted in the third order had passed, was denied by the district court.

On August 13, 1998, the district court granted Oki's unopposed motions for summary judgment of noninfringement and invalidity. On August 21, the case was closed. After the district court's ruling, Hazani filed motions to extend the time to file a motion for reconsideration and various other motions. The district court denied the motions and, finally, on September 17, 1998, issued an order directing that no further submissions would be accepted absent leave of the court. The district court also reminded Hazani that he had limited time to appeal the final judgment entered by the district court.

On December 1, 1998, Hazani, without seeking leave of court, submitted an opposition to the summary judgment motion and a Fed. R. Civ. P. 60(b) motion. On December 8, 1998, the district court noted that "no leave was sought or granted" and stated that "there is no injustice in not reviewing Mr. Hazani's grossly untimely papers. The case remains closed." The district court's docket sheet

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. The summary judgment motions were filed after this court affirmed an International Trade Commission determination relating to noninfringement and invalidity of the same patent. Hazani v. ITC, 126 F.3d 1473 (Fed. Cir. 1997).

reflects that neither Hazani's submissions nor the district court's order was entered on the docket.

Hazani filed a notice of appeal on January 7, 1999. In the notice, Hazani sought review of seemingly all district court orders that were adverse to him, including the December 8, 1998 order.

Because Hazani's appeal is untimely with respect to all orders relating to the merits of his case, we treat his request for review as a petition for writ of mandamus. Similarly, we treat Hazani's request for review of the December 8 order refusing to file his submissions as a petition for writ of mandamus to direct the district court to file and rule on his papers.

A writ of mandamus will issue only in exceptional circumstances to correct a clear abuse of discretion or usurpation of judicial power by a trial court. In re Calmar Inc., 854 F.2d 461, 464 (Fed. Cir. 1988). A party who seeks a writ bears the burden of proving that it has no other means of attaining the relief desired, Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296, 309 (1989), and that the right to issuance of the writ is "clear and indisputable." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). A litigant does not have a clear and indisputable right to a particular result in matters committed to the discretion of the district court. Id.

To the extent that Hazani seeks review of any orders entered before December 8,1998, the court declines to disturb them. Hazani failed to timely appeal from the final judgment and failed to file any postjudgment motions that would have tolled the time to appeal. This court will not "engage in extraordinary review by mandamus in aid of its jurisdiction . . . when it can exercise the same review by a contemporaneous ordinary appeal." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 8, n.6 (1983).

With regard to the district court's December 8,1998 order, Hazani has not shown that his right to a writ is clear and indisputable. The district court's refusal to file or consider Hazani's opposition to the summary judgment motions or his Rule 60(b) motion, without an accompanying motion for leave to file, clearly does not constitute an abuse of discretion. The district court had previously granted Hazani three extensions of time to file an opposition to the summary judgment motions, yet Hazani failed to submit a timely opposition. Moreover, Hazani, despite the district

court's instructions, failed to request leave of court before submitting the untimely opposition to the summary judgment motions and the Rule 60(b) motion. "The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." Whitaker v. Super. Court of California. San Francisco County, 514 U.S. 208, 210 (1995) (directing Clerk of Court not to accept any further petitions for certiorari filed by pro se petitioner in noncriminal cases). The district court's refusal to file or consider Hazani's opposition to the summary judgment motions or his Rule 60(b) motion, without a motion for leave to file, was not an abuse of discretion.

Accordingly,

IT IS ORDERED THAT:

(1) Hazani's petition for a writ of mandamus is denied.

(2) The parties' motions are moot.

(3) The revised official caption is reflected above.

FOR THE COURT

MAY 14, 1999

Date

s/_____
Randall R. Rader
Circuit Judge

cc: Emanuel Hazani,
Cecilia H. Gonzalez, Esq.
J. Frank Osha, Esq.
Henry A. Petri, Jr., Esq.
Matthew D. Powers, Esq.
Robert M. Taylor, Jr., Esq.
S13

FILED

U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 14 1999

JAN HORBALY
CLERK

99-1198

APPENDIX B:
Memorandum And Order of District Court Judge John Lifland. "Entered on the Docket" December 8, 1998.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EMANUEL HAZANI and PATENT ENFORCEMENT FUND, INC., Plaintiffs,	: CIVIL ACTION NO. 95-0134 (ICL)
v.	: MEMORANDUM AND ORDAER
OKI ELECTRIC INDUSTRY: CO., LTD., ET AL.,	: FILED DEC 4 1998 AT 8:30.....M WILLIAM T. WALSH CLERK
CO., LTD., et al.,	: ENTERED ON THE DOCKET ON 12-8-98
Defendants.	: WILLIAM T. WALSH, CLERK By S/_____ A. ROSSI (DEPUTY CLERK)

LIFLAND, District Judge

This Court granted defendants' motions for summary judgement in a Memorandum and Order filed August I 1, 1998. The Court considered the motions as unopposed because Mr. Hazani failed to submit briefs despite three extensions and two adjournments of the return date. The case was closed by the Clerk's office shortly thereafter. Plaintiff Hazani has now submitted to the Clerk's of Office briefs and supporting materials in support of his belated opposition to defendants' motions for summary judgment. No leave of court was sought or granted.

The Court is mindful of Mr. Hazani's pro- se status and whether there was any fundamental unfairness in the procedure of the Court. The Court has again reviewed the decision of the Federal Circuit (which was adverse to plaintiff) and has reviewed Mr. Hazani's brief to determine if Mr. Hazani has any sort of meritorious claim.

In its Memorandum and Order filed August 11, 1998, the Court stated: "Though the Federal Circuit's rulings with respect to the invalidity of the texturing and chemically engraved claims and the non-infringement of Claim 14 are not entitled to preclusive effect, plaintiff does not assert, and the record does not disclose, any grounds which would justify this Court's deviation from those rulings." (p. 9). The Court then stated that it was persuaded by the Federal Circuit's analysis. After a review of Mr. Hazani's Opposition Brief, the Court determines that Mr. Hazani presents no grounds to justify this Court's deviation from the Federal Circuit's rulings. For example, Mr. Hazani's principal, and perhaps sole, argument on validity is as follows:

> As I contended above the record of evidence before the ITC and before the Federal Circuit was maliciously deprived by lawyers who purported to be my attorneys, in order to defeat my cause. In the past the Federal Circuit reversed its own earlier claim interpretation of the same patent as a question of law when the stage of proceedings changed .... Therefore, in light of the facts newly presented to this court, and the new contentions regarding the law, the decisions of the ITC and the Federal Circuit in Hazani, supra, should be given no weight.

Opp. Br. at 13. Nothing asserted therein would suggest "thoroughly justified grounds" for a change of view by the Federal Circuit. Accordingly, there is no injustice in not reviewing Mr. Hazani's grossly untimely papers.

The case remains closed.

s/_____
John C. Lifland
U.S. District Judge

APPENDIX C: Selected Portions of District Court's Order of 8-13-98, Marked "*" are redacted.

NOT FOR PUBLICATION

FILED AUG 11 1998
AT 8:30.....M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EMANUEL HAZANI and PATENT ENFORCEMENT FUND, INC., Plaintiffs,	:	CIVIL ACTION NO 95-0134 (JCL)
v.	:	MEMORANDUM AND ORDER
	:	ENTERED ON THE DOCKET
OKI ELECTRIC INDUSTRY CO., LTD., et al., Defendants.	:	ON 8-13-98 WILLIAM T. WALSH, CLERK By s/_____ A. Rossi

LIFLAND, District Judge

Presently before the Court are three unopposed motions by defendants for summary judgment of invalidity and non-infringement of certain patent claims. For the reasons set forth herein, two motions will be granted. One motion will be denied as moot.

BACKGROUND

On November 24, 1992, United States Patent 5,166,904 (hereinafter the '904 patent") was issued to plaintiff Emanuel Hazani (hereinafter "plaintiff"). On December 28, 1994, plaintiff filed a complaint with the United States International Trade Commission (hereinafter the "ITC"), alleging that certain Japanese and Korean semiconductor manufacturers and their United States subsidiaries infringed various claims of the '904 patent. In early 1995, the ITC commenced an investigation of plaintiff' s complaint, naming the

foreign manufacturers and their American distributors as respondents (hereinafter the "ITC respondents"). On January 11, 1995, plaintiff filed this patent infringement action, naming the ITC respondents as defendants. Plaintiff's instant complaint alleges that defendants' dynamic random access memory devices infringe various claims of the '904 patent. The same patent and identical memory devices at issue in the ITC proceeding are at issue in this action.

*

*

On August 18, 1995, NEC Corporation, NEC Electronics, Inc. (hereinafter "'NEC"), Samsung Group, Samsung Electronics America, Inc., Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc. (hereinafter "Samsung"), Mitsubishi Electric Corporation, Mitsubishi Electronics America, Inc. (hereinafter "Mitsubishi") and OKI filed a joint motion for summary determination that the '904 patent claims 1, 2, 4-13, 15-17 and 22-25 (hereinafter the "texturing claims") were anticipated by prior art and therefore invalid. On September 12, 1995, the ALJ granted the motion, holding that the texturing claims are invalid as anticipated by United States Patent 4,758,986 (hereinafter the "Kuo '986 patent") because every limitation of the claims is found in the Kuo '986 patent, either explicitly or inherently (hereinafter "Order 59").

*

*

On May 4, 1998, in light of the Federal Circuit's decision, defendants filed: (1) a joint motion for summary judgment of invalidity of the texturing and chemically engraved claims4 and (2) a joint motion for summary judgment of non-infringement of claim 14. The same day, OKI Defendants' invalidity motion includes all of the chemically engraved claims, with the exception of claim 21, which they do not mention. Though claim 21, like claims 18-20 and 26-28, also requires a "chemically engraved surface" and is therefore characterized as a chemically engraved claim, claim 21 is only the subject of OKI's non-infringement motion.

*

*

Determinations of the ITC on patent issues and decisions of the Federal Circuit in appeals from ITC determinations are not

accorded preclusive or collateral estoppel effect. Texas Instruments, Inc v. Cypress Semiconductor Corp, 90 F.3d 1558, 1568-69 (Fed. Cir. 1996) (citing cases). However, district courts are not free to ignore holdings of the Federal Circuit which bear on cases before them. IL at 1569. District courts may accord whatever persuasive value they consider justified to the prior determinations. Id. On appeal, the Federal Circuit is then free to thoroughly review the district court's decision. Id. The Federal Circuit is bound to follow its own precedents, "and to the extent [it has] previously ruled on a matter, a subsequent panel will have powerful incentives not to deviate from that holding, short of thoroughly justified grounds." Id.

*

*

Court will therefore follow the Federal Circuit's holding. Accordingly, the Court will grant defendants' motions for summary judgement of invalidity of the texturing claims and the chemically engraved claims and for summary judgment of non-infringement of claim 14.

*

*

Accordingly, for the foregoing reasons, IT IS on this 10th day of August 1998 ORDERED that defendants' motion for summary judgment of invalidity of claims 1, 2, 4-13, 15-20 and 22-28 of the '904 patent is granted;

IT IS FURTHER ORDERED that defendants' motion for summary judgment of noninfringement of claim 14 of the '904 patent is granted;

II IS FURTHER ORDERED that OKI's motion for partial summary judgement of noninfringement of claims 18-21 and 26-28 of the '904 patent is denied as moot.

s/_____
John C. Lifland
U.S. District Court

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EMANUEL HAZANI and PATENT ENFORCEMENT FUND, INC.,
Plaintiffs,
v.
OKI ELECTRIC INDUSTRY CO., LTD., et al.,
Defendants

FILED OCT 1, 1998
AT 8:30.....M
WILLIAM T. WALSH
CLERK

CIVIL ACTION NO. 95-0134
(JCL)

MEMORANDUM AND ORDER

ENTERED
ON THE DOCKET
ON 10-2-1998
WILLIAM T. WALSH, CLERK
By s/_A. Rossi_____
(Deputy Clerk)

LIFLAND, District Judge

Presently before the Court are two applications by plaintiff Emanuel Hazani (hereinafter "plaintiff"). The first seeks an extension of time to file a motion for reconsideration of the Court's Order granting defendants' motions for summary judgment of invalidity of certain claims and for non-infringement of another claim. The second is seeks an extension of time to file a motion for reconsideration of the Magistrate Judge's Order dismissing as moot plaintiff's motion to disqualify defendant's counsel.

Plaintiff has sought and obtained several extensions of time in this action. The Court granted plaintiff three extensions of time to file opposition briefs to defendants' summary judgment motions for invalidity and non-infringement and twice adjourn the return date of those motions. However, plaintiff did not submit any opposition. The Court's Order granting defendants' summary judgment motions disposed of this case and rendered plaintiff's appeal of the Magistrate

Judge's Order moot. The Court finds no reason for granting plaintiff an extension of time to file a motion for reconsideration of the Court's decision on motions he chose not to oppose.

Accordingly, for the reasons set forth herein, IT IS on this 1st day of October 1998 ORDERED that plaintiff's application for an extension of time to file a motion for reconsideration of the court's Order granting defendants' motions for summary judgement of invalidity of certain claims and for non-infringement of another claim returnable on October 13, 1998 is denied;

IT IS FURTHER ORDERED that plaintiff's application for an extension of time to file a motion for reconsideration of the Magistrate Court's Order dismissing as moot plaintiff's motion to Disqualify defendant's counsel returnable on October 13, 1998 is denied.

s/_____
John C. Lifland
U.S. District Judge

APPENDIX E

RECEIVED
WILLIAM T. WALSH, CLERK
1998 DEC - P 1:33

Emanuel Hazani
1210 Sesame Drive
Sunnyvale, CA 94087
(408) 737-1877

November 29, 1998

Mr. William T. Walsh, Clerk
United States District Court
Martin Luther King, Jr.
Federal Building and Court House,
50 Walnut Street
Newark, NJ 07101-0419

Re: Hazani and Patent Enforcement Fund, Inc. v
Oki Electric Co., Ltd. et al., Civil No. 95-134 (JCL).

Dear Mr. Walsh,

Enclosed herein please find for filing two copies of the following:

1) BRIEF OF MOTION OF PLAINTIFF HAZANI FOR LEAVE TO FILE AND A BRIEF OF MOTION FOR EXTENSION OF TIME AND TO SET ASIDE CERTAIN ORDERS OF THE COURT AND ACTION OF THE CLERK.

(2) NOTICE OF MOTION OF PLAINTIFF HAZANI FOR LEAVE TO FILE AND A NOTICE OF MOTION FOR EXTENSION OF TIME AND TO SET ASIDE CERTAIN ORDERS OF THE COURT AND ACTION OF THE CLERK.

3) Proposed Order granting MOTION OF PLAINTIFF HAZANI FOR LEAVE TO FILE AND A MOTION OF MOTION FOR EXTENSION OF TIME AND TO SET ASIDE CERTAIN ORDERS OF THE COURT AND ACTION OF THE CLERK

4) Declaration of Emanuel Hazani dated November 29, 1998.

In compliance with F.R.C.P., the above documents were deposited with the U.S.P.S. Express Mail, in order to be accorded today's filing date.

Please return the extra copy in the envelop provided.

Sincerely,

Emanuel Hazani
Plaintiff, *Pro se.*

encl.

APPENDIX F

Emanuel Hazani
1210 Sesame Drive,
Sunnyvale, CA 94087
(408) 737-1877
Plaintiff, *pro se.*

Return Date: December 24, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EMANUEL HAZANI and PATENT ENFORCEMENT FUND, INC.,	) CIVIL ACTION) NO. 95-134 (JCL)
Plaintiffs, v.	)
OKI ELECTRIC INDUSTRY CO., LTD. OKI AMERICA, INC., SAMSUNG GROUP, SAMSUNG ELECTRONIC AMERICA, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG SEMICONDUCTOR, INC., HITACHI LTD., HITACHI AMERICA, LTD., MITSUBISHI ELECTRIC CORPORATION, MITSUBISHI ELECTRONICS AMERICA, INC., NEC CORPORATION, NEC ELECTRONICS, INC., HYUNDAI ELECTRONICS INDUSTRIES CO., LTD., HYUNDAI ELECTRONICS AMERICA, INC., MICRON TECHNOLOGY, INC., MICRON SEMICONDUCTOR, INC.,	)
defendants.	)

BRIEF OF MOTION OF PLAINTIFF HAZANI FOR LEAVE TO FILE AND A BRIEF OF MOTION FOR EXTENSION OF TIME AND TO SET ASIDE CERTAIN ORDERS OF THE COURT AND ACTION OF THE CLERK.

BRIEF OF MOTION OF PLAINTIFF HAZANI FOR LEAVE TO FILE AND A BRIEF OF MOTION FOR EXTENSION OF TIME AND TO SET ASIDE CERTAIN ORDERS OF THE COURT AND ACTION OF THE CLERK.

I. INTRODUCTION

Pursuant to Rule 60(b)(1), and Rule 6(b) of the Federal Rules of Civil Procedures ("F.R.C.P"), I pro se plaintiff Emanuel Hazani hereby motion for reconsideration, to enlarge time to file reply briefs in opposition to defendants' motions for summary judgements, and to set aside and vacate the Orders of the court that were issued by Judge John C. Lifland and entered on August 13, 1998, and September 11, 1998, and September 17, 1998, and October 02, 1998, and also to set aside the Order of Magistrate Judge Stanley R. Chesler, entered August 17, 1998, to dismiss as moot my motion of July 02, 1998, to disqualify defendants' counsel. (Exhibit-1, shows a copy of all said Orders together). The delay in filing this motion for reconsideration and to set aside said five Court Orders is excusable for the reasons detailed below and also the delay for filing replies in opposition to defendants motions for summary judgement is also believed to be excusable.

In the alternative the Court can consider this motion under Rule 55(c) of the Federal Rules of Civil Procedures ("F.R.C.P"), and set aside the above mentioned Orders for "good cause shown", however if the Court does not find this motion proper to consider under Rule 55(c) of the F.R.C.P., or should the Court deny any portion of this motion under Rule 55(c), I am respectfully requesting that this motion be considered under Rule 60(b)(1) and Rule 6(b) as mentioned above.

Also this motion comes to respectfully request from the Court set aside Taxation Of Cost action of the Clerk of Court, which was entered on November 04, 1998, which Clerk action should be set aside under this Rule 55(c), or alternatively under Rule 60(b)(1).

NOT FOR PUBLICATION

FILED SEP 10, 1998
AT 8:30.....M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EMANUEL HAZANI and PATENT ENFORCEMENT FUND, INC., Plaintiffs,	:	CIVIL ACTION NO. 95-0134 (JCL)
v.	:	MEMORANDUM AND ORDER
OKI ELECTRIC INDUSTRY CO., LTD., et al., Defendants	:	ENTERED ON THE DOCKET ON 9-11-1998 WILLIAM T. WALSH, CLERK By s/_A. Rossi_____ (Deputy Clerk)

LIFLAND, District Judge

Presently before the Court are two applications by plaintiff Emanuel Hazani (hereinafter "plaintiff"). The first seek an extension of time to file a motion for reconsideration of the Court's Order granting defendants' motions for summary judgment of invalidity of certain claims and for non-infringement of another claim. The second is plaintiff's appeal from the Magistrate Judge's Order denying plaintiff's motion for transfer of venue.

Plaintiff has sought and obtained several extensions of time in this action. The Court granted plaintiff three extensions of time to file opposition briefs to defendants' summary judgment motions for invalidity and non-infringement and twice adjourned the return date of those motions. However, plaintiff did not submit any opposition. The Court's Order granting defendants' summary judgment motions disposed of this case and rendered plaintiff's appeal of the Magistrate Judge's Order moot. The Court finds no reason for granting plaintiff

an extension of time to file a motion for reconsideration of the Court's decision on motions he chose not to oppose.

Accordingly, for the reasons set forth herein, IT IS on this 10th day of September 1998 ORDERED that plaintiff's application for an extension of time to file a motion for reconsideration is denied;

IT IS FURTHER ORDERED that plaintiff's appeal from the Magistrate Judge's Order denying plaintiff's motion for transfer of venue is moot.

John C. Lifland

U.S. District Judge

Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

(2)

No. 99-297

In the Supreme Court of the United States

OCTOBER TERM, 1999

EMANUEL HAZANI,

Petitioner,

v.

OKI ELECTRIC INDUSTRY CO. LTD., OKI AMERICA, INC., SAMSUNG GROUP, SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., MITSUBISHI ELECTRIC CORPORATION, MITSUBISHI ELECTRONICS AMERICA, INC., NEC CORPORATION, AND NEC ELECTRONICS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

Cecilia H. Gonzalez
Counsel of Record
Juliana M. Cofrancesco
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Samsung Respondents
(Additional Counsel Inside Cover)

23PP

J. Frank Osha
Howard L. Bernstein
SUGHRUE, MION, ZINN,
MACPEAK & SEAS
2100 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20037-3202
(202) 663-7937
Attorneys for NEC Respondents

Robert M. Taylor, Jr.
David B. Murphy
LYON & LYON
3200 Park Center Drive, Suite 1200
Costa Mesa, CA 92626
(714) 751-6606

Attorneys for Mitsubishi Respondents

Matthew D. Powers
Jared Bobrow
WEIL, GOTSHAL
& MANGES LLP
2882 Sand Hill Road
Suite 280
Menlo Park, CA 94025
(650) 926-6200

Attorneys for OKI Respondents

QUESTION PRESENTED

Did the federal appeals court correctly determine that it lacked appellate jurisdiction by reason of petitioner's failure timely to file a notice of appeal, or timely to file any motion that would toll the time, or extend the time, for filing a notice of appeal?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), all parties appear in the caption of the case on the cover page, with the exception that Samsung Group does not exist as a legal entity.

RULE 29.6 STATEMENT

Respondents state that all of their parent corporations and any publicly held company owning 10% or more of the Respondent corporations' stock are as follows:

Samsung Electronics Co. Ltd., a publicly-traded corporation organized under the laws of the Republic of Korea has no parent or publicly-traded affiliates as those terms are commonly employed under United States law. Samsung Electronics America, Inc. and Samsung Semiconductor, Inc. are not publicly-traded. Samsung Group does not exist as a separate legal entity.

Mitsubishi Electric Corporation and Mitsubishi Electronics America, Inc. have the following publicly held parent, affiliate or subsidiary companies: SPC Electronics Corporation; The Kodensha Corporation; Optec Dai-ichi Denko Co., Ltd.; Nihon Kentetsu Co., Ltd.; Toyo Takasago Dry Battery Co., Ltd.; Shizuki Electric Corporation; Kanaden Corporation; Ryoden Trading Co., Ltd. Oi Electric Co., Ltd.; Mansei Corp.; Shihlin Electric & Engineering Corp.; China Electric Mfg. Corp.; Kang Yong Electric Public Co., Ltd.

The parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public, of the NEC Respondents are: Nippon Electric Glass Co., Inc.; Japan Aviation Electronics Industry, Ltd.; Tokyo Communication Equipment Co., Ltd.; Nitsuko, Ltd.; NEC Systems Integration & Construction, Ltd., Anritus Corporation; Ando Electric Co., Ltd.; Nippon Avionics Co.,

Ltd.; Nippon Electric Industry, Co., Ltd.; Nippon Computer System Co., Ltd.; Tama Electric Co., Ltd.

OKI Electric Industry Co., Ltd. presently owns more than five percent of the shares of each of the following companies, which are publicly traded in Japan: Keihin Corporation; OKI Electric Installation Co., Ltd.; Kinseki Ltd.; Okaya Electric Industry Co., Ltd.; OKI Electric Cable Co.; Ltd.; Taiko Electric Works Ltd.; and Tamura Electric Works Ltd.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

STATEMENT OF PRIOR PROCEEDINGS 1

REASONS FOR DENYING THE WRIT 7

I. This Case Involves No Conflict Among the Circuits on Any Important Question Of Federal Law 7

A. There is No Conflict Among the Courts of Appeals Regarding the Deadline for Filing An Appeal 7

B. The December 8 Postjudgment Order of the District Court Was Correctly Deemed to Be A Non-Appealable Order 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Advanced Estimating System Inc. v. Riney, 77 F.3d 1322 (11th Cir. 1996) 7, 8, 9, 11, 12

Browder v. Department of Corrections, 434 U.S. 257 (1978) 11

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) 9

Hazani v. United States International Trade Commission, 126 F.3d 1473 (Fed. Cir. 1997), *pet. for reh'g and suggestion for en banc review denied*, 1998 U.S. App. LEXIS 1370 (Fed. Cir. Jan. 22, 1998), *petition for cert. filed*, 68 U.S.L.W. 3138 (U.S. Aug. 12, 1999) (No. 99-297) 2

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 6

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993) 12

Texas Instruments, Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997) 2

Whitaker v. Superior Court, 514 U.S. 208 (1995) 6, 14

STATUTES AND RULES

19 U.S.C. § 1337 2

Fed. R. App. P. 4(a)(4) 3, 7, 9, 10

Fed. R. App. P. 4(a)(5) 4, 11, 12, 13

Fed. R. App. P. 4(b) 12

Fed. R. Civ. P. 6(b) 4, 9, 10, 11

Fed. R. Civ. P. 59(b) 3, 4, 10, 11

Fed. R. Civ. P. 60(b) ..... *passim*

In the Supreme Court of the United States

OCTOBER TERM, 1999

No. 99-297

EMANUEL HAZANI,

Petitioner,

v.

OKI ELECTRIC INDUSTRY CO. LTD., OKI AMERICA, INC., SAMSUNG GROUP, SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., MITSUBISHI ELECTRIC CORPORATION, MITSUBISHI ELECTRONICS AMERICA, INC., NEC CORPORATION, AND NEC ELECTRONICS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

The Petition mischaracterizes both the decision of the court of appeals below and the decisions of eight other circuit courts in an attempt to manufacture an intercircuit conflict where none exists. This case presents no substantial unsettled question of federal law. Accordingly, the Petition lacks merit and should be denied.

STATEMENT OF PRIOR PROCEEDINGS

On May 4, 1998, Respondents filed in the U.S. District Court for the District of New Jersey a Joint Motion

for Summary Judgment of Invalidity of Claims 1, 2, 4-13, 15-20 and 22-28 of U.S. Patent 5,166,904 ("the '904 patent") issued to Petitioner and a Joint Motion For Summary Judgment Of Non-Infringement Of Claim 14 of the '904 patent. The issues set forth in these summary judgment motions had been fully litigated in prior related litigation involving the same patent before the U.S. International Trade Commission ("ITC") pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The ITC had held, and the Federal Circuit affirmed, that the '904 patent claims were invalid as anticipated by the prior art and that claim 14 was not infringed. *See Hazani v. United States Int'l Trade Comm'n*, 126 F.3d 1473 (Fed. Cir. 1997), *pet. for reh'g and suggestion for en banc review denied,* 1998 U.S. App. LEXIS 1370 (Fed. Cir. January 22, 1998), *petition for cert. filed,* 68 U.S.L.W. 3138 (U.S. Aug. 12, 1999)(No. 99-297).[1]

Hazani requested, and was granted, three extensions of time to file his opposition to the summary judgment motions, but he failed to file an opposition within the time specified in the Orders granting these extensions. On May 19, 1998, Hazani moved *pro se*[2] for an uncontested fifteen

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[1] The ITC's ruling on patent issues, as affirmed by the Federal Circuit, is persuasive authority in a plaintiff's later district court patent infringement suit against defendants based on the same patent. *See, e.g., Texas Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1568-69 (Fed. Cir. 1996), *cert. denied,* 520 U.S. 1228 (1997). To the extent the Federal Circuit has already ruled on a matter on review of an ITC decision, a district court, and subsequent appellate panel on review of a district court decision, may not deviate from that prior holding short of thoroughly justified grounds. *Id.* at 1569.

[2] Hazani was represented by patent counsel in the prior ITC litigation. Hazani was also represented by counsel in the parallel District Court action until March 14, 1996, when the Court granted Hazani's counsel's

(15) day extension of time to file his opposition to Respondents' summary judgment motions in the District Court. On the day the oppositions were due, June 8, 1998, Hazani moved for another extension of time, requesting an additional 90 days to oppose the summary judgment motions. The District Court again extended Hazani's time to respond by fifteen (15) days and warned him that failure to file an opposition within that time period would result in the court treating the summary judgment motions as unopposed. Once again on the day his opposition was due, July 6, 1998, Hazani filed yet another motion to extend time, which the District Court granted allowing Hazani until July 14 at 4 p.m. to file his opposition. Again, the District Court admonished that no further extensions of time would be granted. Upon Hazani's fourth application to extend time, filed on July 27, three days after the opposition was due, the District Court denied the request by Order docketed July 31, 1998, and informed Hazani that the summary judgment motions would be treated as unopposed.

On August 13, 1998, the District Court granted defendants' motions for summary judgment and disposed of the case on the merits. Pet. App. C ("Aug. 13 Order"). On August 21, 1998 the case was closed.

During the ten day period following the August 13 Order, Hazani filed no motion that would have tolled the period for filing an appeal under Appellate Rule 4(a)(4). Instead, on August 31 and September 8, 1998, Hazani filed motions to extend the time to file a Rule 59(b) motion for reconsideration of the final judgment on the merits. On September 11, 1998, the District Court denied those motions on the ground that Hazani had not opposed the summary

---

motion to withdraw its appearance. On April 22, 1996, Hazani filed notice to the District Court that he would proceed *pro se*.

judgment motions even after the court granted him three extensions of time to do so. Again, on September 11, Hazani renewed his request for an extension of time to file a motion to reconsider the August 13 Order which was denied on October 2, 1998. Hazani's repeated motions for extensions of time to file a motion under Fed. R. Civ. P. 59(b) do not toll the time for appeal pursuant to Fed. R. Civ. P. 6(b) contrary to Petitioner's allegation.

On September 17, 1998 the District Court issued an Order directing that, absent leave of court, no further filings from Hazani would be accepted other than a notice of appeal. The court's Order noted that the case was closed on August 21, yet Hazani persisted in presenting additional material for filing without leave of the court to do so.

The District Court explicitly warned Hazani in the September 17 Order that he had a limited time to appeal the final judgment entered by the District Court. Hazani, at his peril, chose to ignore the District Court's reminder regarding the strict time limitation for filing an appeal.

Hazani failed to file a notice of appeal within the mandatory 30 day period following judgment on the merits. Moreover, after the 30 day period for filing a notice of appeal had passed, Hazani never filed a motion for an extension of time to file an appeal pursuant to Appellate Rule 4(a)(5). Consequently, Hazani's right to appeal, and right to request an extension to file an appeal out of time, of the District Court's judgment on the merits expired sixty days after the August 13 Order was entered.

Hazani's right to appeal could not be legally revived by his later submissions to the District Court. Without seeking leave of the District Court as required by the September 17 Order, Hazani separately submitted to the

District Court on December 1, 1998, a brief in opposition to Respondents' motion for summary judgment and a Rule 60(b) motion.[3] Despite the fact that Hazani's opposition brief was grossly untimely, in an abundance of caution, and in view of Hazani's *pro se* status, the District Court, ruled by Order entered on December 8, 1998, that Hazani's opposition failed to set forth any grounds for a change in view of the Federal Circuit regarding Hazani's patent and therefore held that "there is no injustice in not reviewing Mr. Hazani's grossly untimely papers. The case remains closed." December 8, 1998 Order at 1, Pet. App. B.

Thereafter, on January 7, 1999, one hundred forty-seven (147) days after the August 13 Order disposing of Hazani's case on the merits, Hazani filed his untimely notice of appeal of nearly all orders rendered adverse to him by the District Court, including the August 13 and December 8 Orders.[4]

Respondents promptly filed with the Federal Circuit a joint motion to dismiss the appeal on March 9, 1999. Respondents argued that the appellate court lacked jurisdiction to review the final judgment and the various

---

[3] Because the District Court's September 17 Order directed that no further filings in the case would be accepted absent leave of the court, Hazani's documents of December 1, submitted without leave of court, do not appear on the District Court's docket sheet.

[4] Hazani's Notice of Appeal filed January 7, 1999 includes the following orders: a May 14, 1998 order denying Hazani's motion to transfer venue; the August 13 Order granting summary judgment; an August 17 order denying Hazani's motion to disqualify counsel; the September 11 and October 2 orders denying Hazani's motions for extension of time to file for reconsideration of summary judgment; and the December 8 order not to review Hazani's opposition to Respondents' motions for summary judgment.

procedural orders on the ground that Hazani failed to file a timely notice of appeal and did not file any motion to extend his time for appeal.

The Federal Circuit, by Order dated May 14, 1999, agreed with respondents that Hazani's appeal on the merits of his case was untimely. Accordingly, the appellate court treated his request for review of his case on the merits as a petition for writ of mandamus. The appellate court, on mandamus, declined to disturb the District Court's orders entered prior to December 8, 1998 based on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 8 n.6 (1983) in which this Court held that that it will not "engage in extraordinary review by mandamus in aid of its jurisdiction . . . when it can exercise the same review by a contemporaneous ordinary appeal." May 14, 1999 Order, at 3, Pet. App. A.

Further, the Federal Circuit treated Hazani's request for review of the December 8 Order in which the District Court refused to review Hazani's submissions as a petition for writ of mandamus to direct the District Court to file and rule on his papers. Here, the appellate court held that Hazani failed to show his right to a writ was clear and indisputable. The Federal Circuit found no abuse of discretion in the District Court's refusal to file or consider Hazani's opposition brief or Rule 60(b) motion, submitted without leave of court for two reasons. First, despite having received three extensions of time to file an opposition, Hazani failed to do so. Second, despite the District Court's explicit instructions, Hazani failed to request leave of court before submitting his untimely opposition brief and Rule 60(b) motion. Accordingly, based on this Court's ruling in *Whitaker v. Superior Court*, 514 U.S. 208, 210 (1995), the appellate court held the district court's refusal to file or

consider Hazani's submissions did not constitute an abuse of discretion.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The fact-intensive questions presented in the petition involve the application of settled principles to the particular record in this case and do not warrant this Court's review. Petitioner offers no persuasive rationale to upset the appeals court's ruling that Petitioner failed to preserve his right of appeal despite having been warned of the limited time for appeal.

I.
This Case Involves No Conflict Among the Circuits on Any Important Question Of Federal Law

A. There is No Conflict Among the Courts of Appeals Regarding the Deadline for Filing An Appeal

Although Hazani cites a sprinkling of authorities from other jurisdictions and this Court, *see* Pet. at 11, he offers no meaningful analysis of why those decisions supposedly conflict with the decision of the Federal Circuit in this case. In fact, no conflict exists.

There is no merit to Petitioner's contention that the court of appeals miscalculated the time for filing a notice of appeal, by misapplying the tolling provisions of Fed. R. App. P. 4(a)(4), and thereby diverged from the decisions of the majority of other courts of appeals. Petitioner's primary

argument is that the Federal Circuit's decision is in conflict with the Eleventh Circuit's decision in *Advanced Estimating System Inc. v. Riney,* 77 F.3d 1322 (11th Cir. 1996) because the Federal Circuit failed to hold that Hazani's Rule 60(b) motion, submitted to the District Court on December 1, 1998, tolled the time for filing an appeal of the August 13 final judgment. Petitioner assigns this error based on an incomplete quotation of the holding of the Eleventh Circuit in *Advanced Estimating System.* That quotation is as follows:

> "Despite the thirty day time restriction mandated by Rule 4, the running of the appeal period may be tolled by filing one of the motions listed in Rule 4, including a Rule 59 or 60 motion."

Pet. at 11 (quoting *Advanced Estimating Sys.,* 77 F.3d at 1323). Based on this quotation, Petitioner argues that his Rule 60(b) motion, filed 110 days after entry of judgment, tolled the time for filing a notice of appeal of the August 13 Order.

Petitioner's selective quotation omits the remainder of the Eleventh Circuit's holding that is absolutely fatal to his argument. The full quotation from the Eleventh Circuit decision goes on to hold that unless filed within ten days of the final judgment, Rule 59 and 60 motions do not toll the time for appeal. The full quotation is as follows:

> Despite the thirty day time restriction mandated by Rule 4, the running of the appeal period may be tolled by filing one of the motions listed in Rule 4, including a Rule 59 or 60 motion. Only if such a motion is filed timely, however, will it successfully suspend the appeal period. Fed. R. App. P. 4(a)(4). Untimely motions under Rules 59 and 60 will not toll

> the time for filing an appeal. *Gribble v. Harris,* 625 F.2d 1173, 1174 (5th Cir. 1980). Rule 59 and 60 motions are timely if filed within ten days of entry of final judgment. Fed. R. Civ. P. 59(b) (a motion for new trial shall be served not later than ten days after the entry of judgment); Fed. R. App. P. 4(a)(4)(F) (a Rule 60 motion will suspend the period of appeal if the motion is served within ten days after the entry of judgment). The appellants filed their Rule 59 and 60 motions twelve business days after entry of judgment. . . . Accordingly, as appellants concede, their Rule 59 and 60 motions were untimely and thus did not extend the time for filing a notice of appeal."

Advanced Estimating Sys., 77 F.3d at 1323-24 (footnote omitted).

Pursuant to the principles set forth in *Advanced Estimating Systems,* the authority relied upon by Petitioner, Hazani's Rule 60(b) motion, submitted months after the time for filing an appeal had expired, could not have tolled the time for filing an appeal of the August 13 judgment on the merits pursuant to Appellate Rule 4(a)(4). Accordingly, there can be no doubt that the Federal Circuit's holding that Hazani's appeal on the merits is untimely, is based on a correct reading of Rule 4(a)(4) and is entirely consistent with the Eleventh Circuit's holding in *Advanced Estimating System* concerning the operation of this tolling provision.

Equally meritless is Hazani's contention that Fed. R. Civ. P. 6(b) provides authority for a District Court to set aside the 30 day time limit for appeal of the August 13 Order. This Court has held the 30 day time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61 (1982). Notwithstanding this Court's ruling that appellate jurisdiction critically depends upon a timely

notice of appeal, Hazani argues that his various motions invoking Fed. R. Civ. P. 6(b) may effectively set aside this jurisdictional requirement. It is Hazani's belief that his requests for an extension of time to file for reconsideration of the final judgment under Rule 59(b) (the first of which was filed 18 days after entry of judgment) and his motion for an extension of time to file an opposition brief under Rule 60(b) (submitted 110 days after entry of judgment, without obtaining leave of court), somehow tolled the time for filing an appeal of the August 13 final judgment on the merits. *See* Pet. at 12. Hazani seems to argue that Fed. R. Civ. P. 6(b) provides independent authority for the District Court to enlarge the time for filing an appeal when a party requests an extension of time to file a motion under Rules 59(b) or 60(b) outside the 10 day period mandated by the rules. A careful parsing of Rule 6(b) read in conjunction with Rules 59(b) and 60(b)of the Federal Rules of Civil Procedure and Appellate Rule 4(a)(4), unambiguously contradicts Hazani's argument.

Fed. R. Civ. P. 6(b), by its express terms, provides discretionary authority to the District Court to permit the filing of papers outside established deadlines where the failure to comply with the deadlines was the result of excusable neglect, with two important exceptions applicable here, i.e., the filing of Rule 59(b) and 60(b) motions. Specifically, Rule 6(b) provides, in pertinent part:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for

> taking any action under Rules . . . 59(b) . . . and 60(b), ... except to the extent and under the conditions stated in them.

The express language of Fed. R. Civ. P. 6(b) thus states the principle, that Rule 6(b) cannot be used to enlarge the time limit for filing an appeal based on motions filed pursuant to Rules 59(b) and 60(b) except to the extent permitted by those rules. *See Browder v. Department of Corrections,* 434 U.S. 257, 262 (1978) ("Rule 6(b) prohibits the enlargement of the time period prescribed in [Rule 59(b)]."). As noted by the Eleventh Circuit in *Advanced Estimating System* quoted above, in order to toll the time for appeal, motions based on Rules 59 and 60 must be filed within 10 days of entry of judgment in order to effectively toll the time for appeal. *Advanced Estimating Sys.,* 77 F.3d at 1323-24. There is no dispute that Hazani did not file any motion pursuant to Rules 59(b) or 60(b) within the 10 day period so as to toll the time for appeal. Accordingly, Hazani cannot rely on Rule 6(b) to circumvent the rules affecting the finality, and the mandatory period for appeal, of the August 13 final judgment on the merits.

Similarly deficient is Hazani's citation to Fed. R. App. P. 4(a)(5) to support his argument that his December 1 Rule 60(b) motion tolled the time for filing an appeal. Hazani argues that his motion qualifies as a motion that may toll the appeal period under the excusable neglect holdings of the Eleventh Circuit in *Advanced Estimating System,* as well as eight circuit courts cited therein. Thus, Hazani finds that the Federal Circuit's decision is not in accord with these circuit court rulings. Again, Hazani's argument mischaracterizes the rulings of the circuit courts on excusable neglect so as to manufacture an intercircuit conflict.

Appellate Rule 4(a)(5) permits a District Court to extend the time to file a notice of appeal based on a showing of excusable neglect if the party so moves no later than 30 days after the time for filing an appeal has expired. Fed. R. App. P. 4(a)(5). This Rule, on its face, does not apply to Hazani's situation because Hazani never filed a motion to extend the time for filing an appeal pursuant to Appellate Rule 4(a)(5). Thus, Hazani's citation to the *Advanced Estimating System* decision of the Eleventh Circuit, which is an appeal of a denial of a Rule 4(a)(5) motion, is unavailing since it is clearly factually distinguishable on this precise procedural issue.

Moreover, the legal point which Hazani identifies as the source of the alleged circuit split based on *Advanced Estimating System,* and cases cited therein, is entirely irrelevant to the issue before this Court. *Advanced Estimating System* cites with approval the holdings of eight other appellate courts on the legal point that this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993), construing the meaning of "excusable neglect" under Bankruptcy Rule 9006(b)(1), applies with equal force to the term "excusable neglect" as it appears in Appellate Rules 4(a)(5) and 4(b). As discussed above, however, the Federal Circuit had no occasion to decide the question of whether excusable neglect justifies Hazani's failure to file a timely appeal pursuant to Fed. R. App. 4(a)(5), because Hazani filed no such motion with the District Court at any time. Since the District Court neither received, nor ruled upon, any motion requesting an extension to file a notice of appeal out of time, the issue of "excusable neglect" under Fed. R. App. P. 4(a)(5) never arose nor was decided by the Federal Circuit. Accordingly, there is no conflict between the Federal Circuit's decision in the appeal below, and the ruling of the Eleventh Circuit in *Advanced Estimating System,* and the cases cited therein

Even if the Court were to treat Hazani's Rule 60(b) motion as if it were a Rule 4(a)(5) motion, that motion would clearly be untimely under that rule inasmuch as it was submitted to the District Court 110 days after entry of judgment. Appellate Rule 4(a)(5) authorizes a court to extend the time for appeal, but only if a motion requesting an extension is filed within 30 days after the period for appeal has expired. Thus, Hazani's argument that Rule 4(a)(5) provides relief against his failure timely to file a notice of appeal must fail.

B. The December 8 Postjudgment Order of the District Court Was Correctly Deemed to Be A Non-Appealable Order

Hazani further assigns error to the Federal Circuit's decision on the ground that the appellate court did not find Hazani had a right to appeal the District Court's December 8 Order, notwithstanding the timely filing of a notice of appeal with respect to that particular order. Hazani's argument is not persuasive inasmuch as Hazani has no right to appeal a ministerial order that pertains to the District Court's control of its docket.

The December 8 Order was correctly interpreted by the Federal Circuit as a refusal to file or consider Hazani's grossly untimely opposition to the summary judgment motions or his Rule 60(b) motion, without an accompanying motion for leave to file these documents. May 14 Order at 3, Pet. App. A. The District Court's refusal to accept Hazani's submissions without leave constitutes an order to enforce the court's prior September 17 Order, which imposed the express requirement that no further filings would be accepted absent leave of the court. Simply put, Hazani's failure to comply with the September 17 Order resulted in the rejection of his

submissions in the December 8 Order. The December 8 Order does not purport to decide Hazani's case on the merits, nor does it have any significance to the case below beyond the fact of the Court's action in controlling its own docket. The Federal Circuit recognized that this type of ministerial order is not appealable under any provision of law, and that courts may properly impose such orders as are necessary to control their dockets when litigants persevere in filing documents so as to divert the limited resources of the court. May 14 Order at 4, Pet. App. A (citing *Whitaker v. Superior Court*, 514 U.S. 208, 210 (1995)). In *Whitaker*, this Court likewise directed the clerk of the court to refuse to accept further petitions for certiorari filed by a *pro se* petitioner in a noncriminal matter so that the Court could devote its limited resources to the meritorious claims of other petitioners. *Id.* Hazani cites no authority, either in his Petition or in the papers filed with the appeals court, that would have permitted the Federal Circuit to review this order on appeal.

Hazani's contention that the District Court should have overlooked his failure to obtain leave properly pursuant to the September 17 order is unpersuasive.[5] Pet. at 9. The District Court had already bent over backwards to accommodate Hazani in every way, in view of his *pro se* status, to assure that he had a full and fair opportunity to address the summary judgment motions on the merits and to advise him of his right to appeal by timely filing a notice of

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[5] Hazani's argument that he had a right to appeal the December 8 Order because he had included within his Rule 60(b) motion a request for leave to file the untimely opposition brief is meritless. Hazani's argument is nothing more than post hoc rationalization for his failure to comply with the simply stated requirement set forth in the District Court's Order of September 17 regarding the rejection of filings without leave after the case was closed. In view of Hazani's deliberate disregard of the Court's September 17 Order, the District Court correctly enforced its Order when it rejected Hazani's submissions on December 8.

appeal. First, the District Court granted Hazani's three motions for an extension of time to file opposition papers. In the last two orders granting extensions, the court warned that failure to submit opposition papers would result in treatment of the motions as unopposed. Hazani chose not to file opposition papers despite these warnings. The Court, having received no opposition from Hazani, had no choice but to issue its final judgment on the merits. Second, after final judgment was entered, the District Court expressly reminded Hazani of the limited time to file an appeal in its September 17 Order. Again, Hazani chose to disregard the District Court's guidance regarding the necessity of preserving his right to appeal by timely filing a notice of appeal to his detriment.

Finally, Petitioner, without justification, asserts that the Federal Circuit erred by failing to deem the December 8 Order as the District Court's determination, after review of Hazani's Rule 60(b) motion and opposition brief, that Hazani's opposition brief had no meritorious claim. Pet. at 10. By this reasoning, Hazani wrongfully attempts to convert a purely ministerial order into one which is a final order subject to appeal. Hazani's attempt to manufacture appellate jurisdiction, however, must fail because it is directly contravened by the District Court's clear statement in the December 8 order. The Court stated therein that "there is no injustice in not reviewing Mr. Hazani's grossly untimely papers. The case remains closed." The plain words of the Order itself dispel any notion that the December 8 Order was a "review" of Hazani's papers as Hazani believes. Because no error exists in the Federal Circuit's decision with respect to the December 8 Order, nor does that decision conflict with any opinion of the circuit courts or of this Court, the Petition does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Cecilia H. Gonzalez
Counsel of Record
Juliana M. Cofrancesco
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Respondents
Samsung Electronics America, Inc.
Samsung Electronics Co., Ltd. and
Samsung Semiconductor, Inc.

J. Frank Osha
Howard L. Bernstein
SUGHRUE, MION, ZINN,
MACPEAK & SEAS
2100 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20037-3202
(202) 663-7937
Attorneys for Respondents
NEC Corporation and
NEC Electronics, Inc.

Robert M. Taylor, Jr.
David B. Murphy
LYON & LYON
3200 Park Center Drive, Suite 1200
Costa Mesa, CA 92626
(714) 751-6606

Attorneys for Respondents Mitsubishi Electronic Corporation and Mitsubishi Electronics America Inc.

Matthew D. Powers
Jared Bobrow
WEIL, GOTSHAL & MANGES LLP
2882 Sand Hill Road
Suite 280
Menlo Park, CA 94025
(650) 926-6200

Attorneys for Respondents OKI Electric Industry Co., Ltd., and OKI America, Inc.

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